

TABLE OF CONTENTS.

	Page
Table of Cases	ii
Table of Statutes	ii
Statement of Case	1-5
Assignment of Errors	5
Brief	6
Argument	7
There Was an Authorized Governmental Appropriation of Private Property, Title to Which Was Conceded to be in the Plaintiffs	7
The National Defence Act of June 3, 1916, c. 134 (39 Stat. L. 166-213), is Applicable to the Facts of the Case	11
The Taking of Plaintiffs' Property Was Not Tortious	11
The Defendant Acquired No Enforceable Rights Under the Contract of Lease Between Plaintiffs and Bates & Rogers Construction Company, to which the Defendant Was Not a Party	21
The Obligations and Construction of the Contract of Lease Between Plaintiffs and Bates & Rogers Are to be Governed by the Laws of Pennsylvania	21
The Lessee, Bates & Rogers, Could Not Acquire Ownership of the Leased Property	21
The Defendant Could Not Release Defendants From Their Obligations Under the Lease	32
Assuming That the Defendant Acquired Rights Under the Contract of Lease Between Plaintiffs and Bates & Rogers, Those Rights Had Not Arisen and Were Not Enforceable When the Defendant Appropriated Plaintiffs' Property ..	35

TABLE OF CASES.

	Page
Adams v. Kuehn, 119 Pa. 76	24-28
Ball, Etc., Co. v. White, 250 U. S. 46	13
Blymire v. Boistle, 6 Watts. (Pa.) 182	23
Bothwell v. United States, 254 U. S. 231	14-16
Campbell v. Lacock, 40 Pa. 448	23
Constable v. Steamship Co., 154 U. S. 51	30
Crown Slate Co. v. Allen, 199 Pa. 249	24
Freeman v. Pennsylvania R. R. Co., 173 Pa. 274	24
Guthrie v. Kerr, 85 Pa. 303	27
Harley v. United States, 198 U. S. 229	18
Hill v. United States, 149 U. S. 593	12
Horstmann Co. v. United States, 257 U. S. 138	14
Insurance Co. v. Water Co., 226 U. S. 220	29
Klinger v. Wick, 266 Pa. 1	25
Langford v. United States, 101 U. S. 341	13
Liverpool Steam Co. v. Phoenix Ins. Co., 129 U. S. 397	21
National Bank v. Grand Lodge, 98 U. S. 123	29
Strauss v. Wanamaker, 175 Pa. 213	32
Sweeney v. Houston, 243 Pa. 542	25
Tempel v. United States, 248 U. S. 121	12
United States v. Bethlehem Steel Co., 42 Sup. Ct. Reporter 335 ..	14
United States v. Buffalo Pitts Co., 234 U. S. 228	14-15-18
United States v. Cress, 243 U. S. 316	14-16
United States v. Great Falls Mfg. Co., 112 U. S. 645	14
United States v. Grizzard, 219 U. S. 180	20
United States v. Rogers, 255 U. S. 163	20

TABLE OF STATUTES.

	Page
Act of February 24, 1905 (33 Stat. L. 811)	34
Act of June 3, 1916, c. 134 (39 Stat. L. 166, 213), Sec. 120	11-19
Act of March 2, 1919 (40 Stat. 1, 1272)	19

IN THE
Supreme Court of the United States.

October Term, 1922. No. 482.

LOUIS KLEBE AND JULES KLEBE, COPARTNERS,
TRADING AS L. KLEBE & COMPANY,
Appellants,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANTS' BRIEF.

STATEMENT OF THE CASE.

This is a claim for \$5000 being the admitted value of a steam shovel belonging to the plaintiffs and appropriated by the United States on October 17, 1918. The Government, while admitting the value of the shovel to be \$5000 at the time of its appropriation, claims first, that the taking was tortious, and secondly, if the taking was not tortious that it has the right to deduct from said value rent amounting to \$4225, paid to plaintiffs by the Bates & Rogers Construction Company, for the use of the shovel, under the terms of a written agreement between the plaintiffs and Bates & Rogers, dated May 18, 1918 (Record, pp. 7-10).

The United States was not a party to the latter agreement. The United States offers the plaintiffs the sum of \$775, being the difference between the value of the shovel, \$5000, and the rentals of \$4225, paid for its use by Bates & Rogers. The plaintiffs ask for judgment in the sum of \$5000.

Bates & Rogers Construction Company entered into a contract with the United States, dated April 26, 1918, for the construction of an interior storage depot at New Cumberland, Pennsylvania. In the prosecution of its contract, Bates & Rogers desired the use of a steam shovel belonging to plaintiffs.

On May 15, 1918, Bates & Rogers arranged, through an equipment company, to lease plaintiffs' shovel for \$25 per day, loading charges and freight to and from location (Findings of Fact VI, Record, pp. 12-13).

Plaintiffs made delivery of the shovel on May 18, 1918 (Record, p. 13).

On May 21, 1918, a lease of the shovel signed by plaintiffs was sent to Bates & Rogers for execution as lessee. It provided that Bates & Rogers should pay plaintiffs \$25 a day rental for the shovel, commencing on the date of bill of lading showing shipment, and cease on date of bill of lading showing return, "machine to be returned in as good condition as received, allowance being made for ordinary wear and tear (Record, pp. 6 and 13).

On June 3, 1918, Bates & Rogers wrote the Terwiliger Equipment Company, which was acting as a broker or agent in negotiating the lease, enclosing a "regulation" form of contract for the shovel and states: "The contents of your contract have been incorporated in the copies which we are sending you" (Record, pp. 7 and 13).

The form of lease enclosed in the last mentioned letter was executed in June, 1918, by the plaintiffs as

lessors, and Bates & Rogers Construction Company, as lessee. The defendant was not a party to it. Under its terms the defendant claims the right of purchase of the plaintiffs' shovel for the difference between its declared value of \$5000 and the rental paid to plaintiffs by the lessee, Bates & Rogers. The lease is set forth in full as Exhibit F (Record, pp. 7-10).

The lease contained the usual bailment covenants whereby the plaintiffs leased to Bates & Rogers the steam shovel in question at a rental of \$25 per day, the lessee to return the equipment in as good condition as when received, ordinary wear and tear and loss by fire or inevitable accident excepted, the lessor to maintain for themselves such insurance as they may desire. The lessors declared the value of the shovels to be \$5000. The lease could be assigned by the Bates & Rogers Construction Company to the United States.

In addition to the foregoing provisions, the lease also provided, in Section 8, that the lessor had made

"himself acquainted with the provisions of Article II of said Contract of 1918, between the party of the second part hereto (Bates & Rogers Construction Company) and the United States Government, and expressly agrees that all of the provisions of paragraph (c) of said Article II, shall apply to and be enforceable against the said equipment furnished and leased hereunder, to the end that the United States Government may have and exercise as to and against the said equipment all rights provided for in said paragraph (c), with respect to plant or parts thereof owned and furnished by the party of the second part hereto, the lessor to be entitled, as owner, to receive any purchase price payments which upon any appropriation of said equipment by the United States Government, under said Article II, may be coming from said Government."

Attached to the agreement of lease is a sheet of paper marked

"ARTICLE II,
"Section (c),"

which contained provisions relative to rental *actually paid by the contractor* for equipment and rental *to the contractor* for equipment *it may own and furnish*, with respect to which *latter equipment* the contractor should file with the contracting officer a schedule setting forth the fair valuation of such equipment, and then follow the provisions that when the total rental paid *to the contractor* for *such* part shall equal the valuation thereof no further rental therefor shall be paid and the title thereto shall vest in the United States; and that at the completion of the work the constructing officer may at his option purchase for the United States any part of such construction plant then owned by the contractor by paying to the contractor the difference between the valuation of such part or parts and the total rentals theretofore paid therefor.

On October 9, 1918, prior to the completion of the work and when the rentals paid to plaintiffs by Bates & Rogers had not amounted to \$5000 (the declared value of the shovel), the constructing quartermaster at New Cumberland, Pennsylvania, recommended to the Chief of Construction Division at Washington, District of Columbia, that the shovel be taken over by the Government "if there is Government work to which it can be assigned." The recommendation was approved on October 14, 1918, by the Chief of the Construction Division of the War Department, and on October 17, 1918, the constructing quartermaster at New Cumberland, Pennsylvania, notified Bates & Rogers that acting upon instructions from Washington the Government's purchase privilege was exercised and the steam shovel taken over as the property of the United States, and

gave directions for the shovel to be shipped to officer in charge of construction at Mays Landing, New Jersey, to whom the shovel was to be invoiced at the difference between the agreed valuation and the rental accrued to date of transfer (Finding of Fact VIII, Record, p. 15).

“ . . . the proper Government officials caused the release of several shovels and took over only such equipment as would relieve the Government from payment of further rentals. This steam shovel was shipped from this work at New Cumberland on November 2, 1918, to Mays Landing, New Jersey, to be used on other Government work” (Finding of Fact IX, Record, p. 18).

“At the time the United States took over the said shovel its fair value was \$5000” (Finding of Fact X, Record, p. 18).

ASSIGNMENT OF ERRORS.

1. The lower Court erred in deciding as a conclusion of law that the plaintiffs were entitled to recover only \$775.

2. The lower Court erred in not deciding as a conclusion of law that the plaintiffs were entitled to recover the sum of \$5000.

3. The lower Court erred in its final judgment that the plaintiffs are entitled to recover and shall have and recover of and from the United States only the sum of \$775.

4. The lower Court erred in its final judgment in not ordering, adjudging and decreeing that the plaintiffs were entitled to recover and should have and recover of and from the United States Government the sum of \$5000.

BRIEF.

We contend that under the lower court's findings of fact in this case:

First. There was an authorized governmental appropriation of private property;

Second. Belonging to, and conceded by the Government to belong to, the plaintiffs;

Third. That the taking of plaintiffs' property was not tortious;

Fourth. That plaintiffs are entitled to just compensation for their property;

That if the United States concedes a right of property in the plaintiff when it appropriates his property, the recovery is not limited to the value of the right which the United States, at the time of the appropriation, conceded to be in the plaintiff, but the latter is entitled to the fair and just value of the property taken.

Fifth. That in ascertaining the amount of the compensation the Government was not entitled to set off the amount of rent paid to plaintiffs by the lessee of plaintiffs' property, under the terms of a lease to which the Government was not a party.

ARGUMENT.

FIRST. THERE WAS AN AUTHORIZED GOVERNMENTAL APPROPRIATION OF PRIVATE PROPERTY,

SECOND. BELONGING TO, AND CONCEDED BY THE GOVERNMENT TO BELONG TO, THE PLAINTIFFS.

The following findings of fact by the lower court sustain these two propositions:

(Transcript of Record, p. 12):

"IV.

"Between April 6, 1917, and November 11, 1918, the United States was engaged in a great war with the German Empire in Europe, on the high seas and in other parts of the world."

"V.

"At, and prior to May 12, 1918, Bates & Rogers Construction Company were erecting for the United States an inland storage depot at New Cumberland, Pennsylvania, for use in the prosecution of the then pending war, and in constructing said depot steam shovels were used. Said work was being performed under a contract between the Bates & Rogers Construction Company and the United States, a copy of which, marked Exhibit G, is attached to and made a part of these findings."

The contract between the Bates & Rogers Construction Company and the United States is set forth *in extenso* in the Findings of Fact, pages 18-29, from which it appears that on April 26, 1918, a written contract was made between the Bates & Rogers Construction Company, as contractor, and the United States by Colonel R. C. Marshall, "acting by order of the Secretary of War," for construction of an interior storage depot at New Cumberland, Pennsylvania, reciting

the joint resolution of Congress of April 6, 1917, that war exists between the United States and Germany causing a national emergency requiring immediate performance of work to be completed within the shortest possible time.

“VI.

Plaintiffs were the owners of an Erie Traction Steam Shovel, No. 74, which Bates & Rogers Construction Company were desirous of leasing for use in erecting the above inland storage depot.

(Transcript of Record, p. 14):

“VIII.

“The said steam shovel of the plaintiffs was appropriated by the Government as its property under the purchase privilege clause of the contract between the plaintiffs and the Bates & Rogers Construction Company and the facts pertaining to said appropriation are as follows: Major W. Morava was the constructing officer under the contract between the Bates & Rogers Construction Company and the United States and Major Henry McConnell, Quartermaster Corps, was duly authorized to act in his place and stead by the War Department. On October 2, 1918, the Bates & Rogers Construction Company sent the following letter to the constructing quartermaster at New Cumberland, Pennsylvania, which officer by the first endorsement attached to said letter forwarded the same to the War Department, which is also shown as follows:

‘October 2, 1918.

‘Major W. Morava,

‘Constructing Q. M., Army Reserve
Depot,

‘New Cumberland, Pa.

‘Dear Sir: You will please be advised that we anticipate being finished using Erie shovel B-74 in about fifteen days.

'This shovel, which is valued at \$5,000.00, and is the property of L. Klebe & Co., Philadelphia, Pa., will have earned approximately \$3,825.00 at that time.

'Kindly indicate to us whether it is the intention of the Government to exercise its purchase privilege.

'Yours truly,

'BATES & ROGERS CONSTRUCTION COMPANY.

'WD-P.'

'1st Ind.

'CONSTRUCTING QUARTERMASTER,

'New Cumberland Pa., Oct. 9, 1918.

'To chief of Construction Division, Washington, D. C.

'1. Forwarded for action. It is recommended that this shovel be taken over by the Government if there is Government work to which it can be assigned.

'HENRY McCONNELL,

'Major, Quartermaster Corps,

'Acting Constructing Quartermaster.'

"The recommendation of the constructing quartermaster contained in the foregoing first indorsement was approved on October 14, 1918, by the Chief of the Construction Division of the War Department, Washington, D. C. On October 17, 1918, the constructing quartermaster notified the Bates & Rogers Construction Company as follows:

'October 17, 1918.

'Memorandum to Bates & Rogers Construction Co.

'Referring to your letter dated October 2, 1918, asking whether or not the Government intends to exercise its purchase privilege on Erie shovel E-74, valued at \$5,000.00,

on which approximately \$3,825.00 rental has accrued, you are advised that, acting upon instructions from Washington, we hereby exercise the Government's purchase privilege and take over said Erie steam shovel B-74 as the property of the United States.

"We are further directed to ship this shovel as soon as we are through with it here to the officer in charge of construction, Mays Landing, N. J., to whom you will invoice the shovel, charging the difference between the agreed valuation and the accrued rental at the date of transfer. This invoice should be certified by this office before being forwarded and a copy should be furnished us to be sent to Washington.

'HENRY McCONNELL,
'Major, Quartermaster Corps,
'Acting Constructing Quartermaster.
'HMCC/W.'"

(Transcript of Record, p. 18):

"IX.

"... the proper Government officials caused the release of several shovels and took over only such equipment as would relieve the Government from payment of further rentals. This steam shovel was shipped from this work at New Cumberland on November 2, 1918, to Mays Landing, New Jersey, to be used on other Government work."

We submit that the foregoing facts found by the lower court establish a taking of the plaintiffs' property by the Department of War in the prosecution of the then pending war and also the continued retention and use of that property by the Government for Government work.

The plaintiffs promptly declared their position in the matter and the Government was immediately noti-

fied of the plaintiffs' demand that their rights be respected, whereupon the Government again recognized the plaintiffs' right of property in the shovel, but insisted upon its appropriation and referred the plaintiffs to the Chief of Construction Division, Washington, D. C., with respect to the disputed claims as to amount of compensation. This appears from the Findings of Fact, Record, pages 16-17.

The National Defence Act of June 3, 1916, C. 134 (39 Stat. L. 166, 213), provides in section 120, that the President in time of war is empowered, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to acquire such material as may be required, and provides that the compensation for such material "shall be fair and just."

From the facts found by the lower court it clearly appears that the plaintiffs' property was appropriated by officials duly authorized to act in the matter by the War Department; that they knew of and recognized the title of the plaintiffs to the property appropriated, and that they intended and offered compensation to the plaintiffs for their property.

The Government contends that the taking was tortious and this contention was sustained in the majority opinion of the lower court.

THE APPROPRIATION OF THE PLAINTIFF'S PROPERTY WAS NOT TORTIOUS.

Mr. Chief Justice Campbell in his opinion (Record, p. 32) said:

" . . . in determining the question here involved as to whether the property was taken under the implied contract, essential to plaintiffs' case, we are not required to pass upon the validity of the Government's claim of right to the property

in question, because, as was said in the *Tempel* case (p. 130): 'It is unnecessary to determine whether this claim of the Government is well founded. The mere fact that the Government then claimed and now claims title in itself, and that it denies title in the plaintiffs, prevents the Court from assuming jurisdiction of the controversy.' "

In our opinion this is failing to make a distinction between a claim of title to the property taken, and a claim of a right of set-off in making compensation for the private property.

Under the decisions the Government is not liable for appropriating that which it claims to own. The Government is not, however, exempted from liability for just compensation for appropriating to public use that which it concedes is private property and for which it offers compensation.

In all the cases cited by the lower court to sustain its decision it appeared that the Government either claimed title in itself or denied title in the plaintiff:

Tempel v. United States, 248 U. S. 121, was an action for damages for dredging plaintiff's land not within the stream. The Government thought and claimed that the land was within the *de jure* stream.

It was held that there was no ground for implying a promise to compensate the owner.

Brandeis, J., page 130: "For the property applied to the public use is not and was not conceded to be in the plaintiff."

In *Hill v. United States*, 149 U. S. 593, the plaintiff asserted a title in the land in question with the exclusive right of building thereon and claimed damages of the United States for the use and occupation of the land for a lighthouse. The United States claimed

that the land was submerged under navigable waters of the United States and that since the adoption of the Constitution it acquired the paramount right to the use of the submerged land for a lighthouse without making any compensation therefor.

In holding that the Federal Court had no jurisdiction of the plaintiffs' claim, Mr. Justice Gray said, page 599:

"It was not alleged in this petition, nor admitted in the plea, that the United States had ever in any way acknowledged any right of property in the plaintiff as against the United States."

In *Langford v. United States*, 101 U. S. 341, agents acting for the United States took possession of buildings and retained them by force under a claim that they belonged to the United States. It was held that the plaintiff could not recover.

Ball Engineering Co. v. White, 250 U. S. 46, plaintiff brought an action for damages for alleged conversion of its property used in the prosecution of work for the United States.

The defendant was put into possession of the property by the Government, and in the contract between the Government and defendant it was expressly stipulated

"that since the ownership of the above mentioned plant and materials is not free from doubt the United States does not undertake to transfer title, does not guarantee peaceable possession and uninterrupted use. . . . Nothing that may result from the exercise of the above-mentioned right shall be made the basis of a claim against the United States or its officers or agents."

While ruling that the defendant, White Company, which procured and used the plaintiff's property, with

knowledge of the facts, should have been held liable, the Court ruled that the Government was not liable, as the facts clearly rebutted any intention on the part of the United States to pay for the plaintiff's property.

Horstmann Co. v. United States, 257 U. S. 138, was a claim for damages for what the Court of Claims found as a fact to be an unforeseen flooding of claimant's property through governmental operations.

It was held the suit could not be maintained as no intentional taking of the claimant's property by the United States could be implied.

This Court has expressed its aversion to a conclusion that the Government's use of a claimant's property was tortious and in the recent case of *United States v. Bethlehem Steel Co.*, 42 Supreme Court Reporter 335 (1922), said:

"A contract, express or implied in fact, must, it is true, be established; but one to pay for a mechanism used will be implied rather than a tortious appropriation of it—rather than the exercise by the United States of its sovereignty in aggression upon the rights of the citizens."

We submit that the case at bar comes within the principles applied in

United States v. Great Falls Mfg. Co., 112 U. S. 645;

United States v. Buffalo Pitts. Co., 234 U. S. 228;

United States v. Cress, 243 U. S. 316;

Bothwell v. United States, 254 U. S. 231.

United States v. Great Falls Mfg. Co., 112 U. S. 645, Harlan, J., page 656-7:

"The law will imply a promise to make the required compensation where property to which

the Government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded upon any contract express or implied, with the Government of the United States."

United States v. Buffalo Pitts. Co., 234 U. S. 228, action to recover for the value of the use of a certain engine which it was alleged the United States was under an implied contract to pay. Plaintiff held a chattel mortgage on a traction engine sold to a party who was using the same in work under a contract with the Government. The contractor defaulted and assigned all its interest in the contract to the United States, which took possession of all material including the engine in question. Plaintiff made demand for the engine upon the defendant, which the defendant refused, and retained and used the property, and notified plaintiff that it would resist plaintiff's attempt to recover possession, but represented to the plaintiff that its attorney would recommend payment for its use.

Day, J. page 235:

"Under the contract it might take possession of the Construction Company's property and, it may be conceded, finish the contract with such property, but it had no right to use the property of others without compensation, and in this case it did not assume to do so. . . . While the Government claimed the right to thus take and use the property, it nevertheless held it without denying the right of the owner to compensation."

United States v. Cress, 243 U. S. 316, Pitney, J.,
page ²⁸⁰₃₂₇.

. . . Where, as in this case, the property owner resorts to the courts, as he may, to recover compensation for what actually has been taken, (it is) upon the principle that the Government by the very act of taking impliedly has promised to make compensation because the dictates of justice and the terms of the Fifth Amendment so require."

Bothwell v. United States, 254 U. S. 231.

The Government in the construction of a dam overflowed plaintiff's land, destroyed hay thereon and rendered it necessary for plaintiff to sell his cattle at prices below their fair value. Proceedings to condemn the land were instituted and its value paid. Plaintiff sued in the Court of Claims to recover for the loss of the hay and destruction of his business. The Court gave judgment for the value of the hay but not for the loss of business, and repeated the above quoted statement from *United States v. Cress*, *supra*, that "the Government by the very act of taking impliedly has promised to make compensation because the dictates of justice and the terms of the Fifth Amendment so require."

From the findings of fact in this case as quoted above (pp. 8-11), it is quite clear that the defendant knew it was appropriating property which it did not own and the title to which it conceded to be in the plaintiffs; that it expected and offered to make compensation therefor, but claimed a right with respect to the *amount* of the compensation to be paid, and the officer making the appropriation for the War Department referred the plaintiffs, as to their claim for greater compensation, to the Chief of Construction Division, Washington, D. C.

We submit that such a taking is not a tortious taking—that there is present all the essential elements to support a valid claim against the Government, to wit:

- (1) An appropriation of private property for public use by parties properly authorized;
- (2) Recognition of title to the appropriated property in the plaintiffs;
- (3) A purpose to make payment therefor.

We think the law is clear that to entitle a plaintiff to relief under the provisions of the Tucker Act two things only need appear in his case, to wit: appropriation of his property to public use by parties properly authorized, and secondly, a recognition of the title of the private party to the appropriated property at the time of its taking. It is not necessary that a purpose to compensate should be manifested by the appropriating official at the time of the taking. The law implies that "just compensation" will be made. The view of the official taking the property that the *amount* of the compensation may be adjusted on a particular basis is wholly immaterial. The Government's view that certain elements effect the *extent* of the compensation, but do not deny the fact of compensation, may or may not be sound in law. But if the Government appropriates what it knows to be private property, the law pronounces that the owner shall receive "just compensation."

PLAINTIFFS ARE ENTITLED TO JUST COMPENSATION FOR THEIR PROPERTY.

This truism is specially referred to because in this case a judgment has been entered for the plaintiffs for \$775 notwithstanding an express finding of fact that the plaintiff's property at the time it was

appropriated by the defendant had a fair value of \$5000 (Finding X, Record, p. 18).

Mr. Chief Justice Campbell in opening his opinion in this case said (Record, p. 29):

“The question for decision is whether from the facts there arises the implication of a contract, by which the Government agreed to pay \$5000, the value of the shovel, as for a taking of the property of plaintiffs for public use.”

We respectfully submit that the question in cases of this character is not whether from the facts there arises the implication of a contract by which the Government agrees to pay a stated sum for private property which it takes for public use, but that the question is whether from the facts there arises the implication of a contract by which the Government agrees to pay for the private property appropriated to public use. If the facts create the implication of a contract to pay, the law fixes the extent of the obligation as the fair value of the property appropriated. It may be essential as said in *Harley v. United States*, 198 U. S. 229, and quoted with approval in *United States v. Buffalo Pitts Co.*, 234 U. S. at page 232 that “there must be some meeting of the minds of the parties upon the fact that compensation will be made,” but no case holds that an error on the part of the Government as to the *extent* of that compensation destroys the fact of the meeting of the minds and makes the appropriation tortious.

The term “meeting of the minds” does not, in this instance, mean agreement upon the *amount* of compensation, but purpose, intent, or accord upon the *fact*, that compensation is to be made—that the Government is taking something which it knows it must pay for, not the price it is to pay.

Where there is an intention on the part of the Government to take property, concededly belonging to another, and the property is taken, there is an implied obligation to pay for the property so taken. The extent of the obligation of the United States is co-extensive with the right of the party whose property is taken, to wit, the one to pay and the other to receive the fair value of the property, when taken. The duty or obligation of the one party and the right of the other cannot be avoided or lessened because the Government thought that the property could be acquired for less money than its then fair value.

If the United States, at the time of the appropriation of private property for public use, concedes a right of property therein in the plaintiff, the latter's recovery is not to be limited to the value of the right of property conceded to be in the plaintiff, but the plaintiff is entitled to fair and just compensation. The Constitution so provides and the Tucker Act was intended to enforce that right. The National Defence Act of June 3, 1916, provides for "fair and just compensation" for material requisitioned under its provisions. The Dent Act of March 2, 1919 (40 Stat. L. 1272), authorizes the Secretary of War to adjust contracts, express or implied, upon a fair and equitable basis.

It is submitted that where the Government takes property, in which it concedes the plaintiff has a right, it is an irrelevant and immaterial factor, in an inquiry to ascertain the amount of the plaintiff's claim, that the Government mistook the nature or value of the plaintiff's rights in the property taken. Having appropriated and retained the property it is liable for its value.

The "just compensation" provided for in the Constitution for the taking of private property for public

use requires that the recompense to the owner for the loss caused to him by the taking shall be measured by the loss resulting to him from the appropriation:

United States v. Grizzard, 219 U. S. 180.

When the plaintiffs' property was taken, the loss, therefore, was the fair value of their interest in the property at the time of its appropriation.

United States v. Rogers, 255 U. S. 163.

What was the interest of the plaintiffs in the steam shovel at the time of its appropriation by the defendant?

The Court has found the following fact (Transcript of Record, p. 18):

"X

"At the time the United States took over the said shovel its fair value was \$5000."

Did the United States have the right to set off against that value the amount of rentals for the shovel paid to plaintiffs by Bates & Rogers Construction Company, to wit, \$4225, thus reducing the value of plaintiffs' interest in the shovel at the time of its taking to \$775?

The Court of Claims did not decide this point, holding that it was unnecessary to do so because the Government claimed title (Record, p. 32).

As we view this case, if the United States has the right to apply the rentals paid to the plaintiffs by the lessee of the shovel for the use thereof, then just compensation to the plaintiffs is \$775, and the judgment should be affirmed.

If, on the other hand, the United States has not that right, then \$5000 is just compensation and the judgment of the Court of Claims in favor of plaintiffs should be modified and increased to the sum of \$5000.

THE UNITED STATES ACQUIRED NO ENFORCEABLE RIGHTS
UNDER THE AGREEMENT BETWEEN THE CLAIMANTS
AND BATES & ROGERS CONSTRUCTION COMPANY.

The contract under discussion is one of lease solely between the claimants and Bates & Rogers Construction Company. The latter obligated itself to pay a certain rental and return the leased article to the lessor. *The lessee had no right to acquire ownership of the leased article. It was immaterial how much rent the lessee paid to the claimants the title to the leased article, as between the actual parties to the contract, remained in the lessor. The United States was not a party to that agreement.* It did not guarantee payment of the rent by the lessee to the lessors, nor guarantee performance by the lessee of any of the latter's covenants. It in no way obligated itself to the lessors. No consideration passed from the United States to the lessors to support any enforceable rights in the United States. There was no privity of contract between the claimants and the United States created by the written contract between the claimants and Bates & Rogers Construction Company. The contract was made in the State of Pennsylvania, and was to be performed and discharged in that jurisdiction.

As the contract in question was made and discharged in the State of Pennsylvania, its nature, obligation and interpretation is to be governed by the law of that State:

Liverpool Steam Co. v. Phoenix Insurance Co.,
129 U. S. 397 (1897), Gray, J.:

"This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence of authority, the general rule *that the nature, the obligation and the interpretation of a contract, are to be governed*

by the law of the place where it is made, unless the parties at the time of making it have some other law in view."

In the present case, the contract was made in Pennsylvania, the lessor delivered the leased article to the lessee in Pennsylvania, the property was to be used by the lessee in Pennsylvania and was to be re-delivered by the lessee to the lessor in Pennsylvania.

The law of Pennsylvania is therefore to govern in ascertaining the rights of the parties and in determining the nature, obligation and interpretation of the contract.

The United States, not being a party to the agreement between the claimants and Bates & Rogers Construction Company, there was no privity of contract between the claimants and the United States created by the contract in question and under the facts of this case and the law of the State of Pennsylvania, and the law as announced by the Federal Courts, the United States acquired no rights under the contract between Klebe & Company and Bates & Rogers Construction Company, which it could enforce against Klebe & Company. Reference is again made to the fact that an examination of the contract between the claimants and Bates & Rogers Construction Company discloses that Bates & Rogers Construction Company, although a direct party to the contract, could not assert the rights which the United States is attempting to assert and enforce in this case. Under section 10 of the agreement, Bates & Rogers could assign the contract to the United States. It does not appear to have done so, but even if it did, the United States as assignee, could not assert the rights which it now claims.

The leading case in Pennsylvania, applying the rule that a third person, not a party to the contract, cannot maintain an action upon it, is *Blymire v. Bois-*

tle, 6 Watts 182. Mr. Justice Sergeant made it clear in his opinion that the ruling was in harmony with the common law, citing in support of the principle, 1 Vin. Abr. 333 to 337, the note to *Piggott v. Thomson*, 3 East 119, *Owing v. Owings*, 1 Har. and Gill 484, and other authorities, including the strikingly similar case of *Howe v. Rogers*, 1 Str. 592.

Blymire v. Boistle was decided in 1837, and it has been consistently followed in Pennsylvania ever since. A brief statement of some of the cases follows:

Blymire v. Boistle, 6 Watts 182.

Boistle had a judgment against Gladstone. In a conversation between Blymire and Gladstone, it was agreed that Gladstone was to convey a lot to Blymire, who was to pay Boistle the judgment Gladstone owed him. Gladstone conveyed the lot. Blymire did not pay the judgment. Boistle brought action against Blymire. It was held that as he was a stranger to the contract and to the consideration, he could not sue on it. Sergeant, *J.*, said:

"If one pay money to another for the use of a third person, or having money belonging to another, agree with that other to pay it to a third, action lies by the person beneficially interested. But where the contract is for the benefit of the contracting party, and the third person is a stranger to the contract and consideration, the action must be by the promisee."

Campbell v. Lacock, 40 Pa. 448.

X, one of two partners, sold out to the other partner, Y, who agreed to pay all debts of the firm and to give security. The surety, B, defendant in the present suit, agreed in writing for the faithful performance of the contract by Y, the purchasing partner. The plaintiff, A, obtained a judgment against both partners for

a debt due by the late firm and being unable to collect on execution, brought this suit against the surety. It was held that the suit could not be maintained because the plaintiff was not a party to the agreement of guaranty; that the promise was not made to him or for his use and benefit; that the consideration did not move from nor had the defendant received anything in trust for him, and there was, therefore, no privity of contract.

Adams v. Kuehn, 119 Pa. 76 (1888).

Weaver Bros. were indebted to plaintiff who sued defendants on the latter's alleged agreement that in consideration of a judgment for \$25,500 confessed by Weaver Bros. to defendant, the latter would pay to plaintiff his account against Weaver Bros. It was held that the suit could not be maintained.

Freeman v. Penna. R. R. Co., 173 Pa. 274 (1896).

The defendant railroad company leased the property and franchises of another railroad company and covenanted in the lease to pay operating expenses and to apply the surplus of earnings, if sufficient for that purpose, to the payment of the coupons for interest on the underlying first mortgage bonds of the lesser company previously issued.

A holder of such coupons brought a suit against the lessee company to recover the amount of the coupons.

It was held that he had no right of action as he was a stranger to the contract and the consideration.

Crown Slate Company v. Allen, 199 Pa. 239 (1901). Fell, J.

The defendant was the owner of 250 shares of plaintiff's stock which he sold to one Hussey under a

promise to Hussey that he, defendant, would pay into plaintiff's treasury \$4 per share assessment on the stock upon call by plaintiff's board of directors. Plaintiff claimed to recover the \$1000 from defendant. Held, the suit could not be maintained.

Sweeney v. Houston, 243 Pa. 542 (1914).
Brown, *J.*

Suit against two members of a firm on a note made by the firm when composed of other parties. The defendants took over the interest of a former party in the firm under an agreement that they would pay all indebtedness of the outgoing party arising from the partnership transactions. Held, that the suit could not be maintained.

The Court followed *Blymire v. Boistle* and after referring to the exceptions to the general rule, said per Brown, *J.*, page 546:

"But when the promise is made to, and in relief of one to whom the promise is made, upon a consideration moving from him, no particular fund or means of payment being placed in the hands of the promisor out of which the payment is to be made, there is no trust arising in the promisor and no title passing to the third person. The beneficiary is not the original creditor who is a stranger to the contract and the consideration, but the original debtor who is a party to both, and the right of action is in him alone."

The late case of *Klingler et al. v. Wick*, 266 Pa. 1 (1920) Frazer, *J.* shows clearly that the Pennsylvania Courts have not relaxed the rule that a stranger to the contract and the consideration can not maintain an action upon it. The case is of real interest with relation to the present case.

Klingler was the owner of a warehouse. Duffy owned an adjoining lot along the far side of which was

a railroad siding which Klingler desired to use. To procure switch connection with the siding Klingler and Duffy entered into an agreement under seal, whereby Duffy agreed to let Klingler *and the railroad company* use the ground from the siding to Klingler's warehouse, "as long as said parties wish to use said switch, for which second party (Klingler) agrees to pay twenty dollars per year." The railroad company was not a party to the agreement. Duffy conveyed his lot to the defendant, Wick, subject to lease. Subsequently, after the death of both Klingler and Duffy, Wick removed the ties and rails from his (formerly Duffy's) property and prevented further use of the switch. Klingler's executors and the railroad company filed a bill in equity to restrain Wick from interfering with the use of the switch.

In holding that the railroad company could not maintain an action upon the contract, the Supreme Court said, *Frazer, J.*, pages 5 and 6:

"The agreement is between Charles Duffy and H. J. Klingler, based upon a consideration paid by Klingler, and for the latter's benefit in providing a means of access to his premises for receiving or shipping materials and supplies incident to his firm's business. No benefit to the railroad company was contemplated other than what it would receive indirectly by virtue of services furnished as a common carrier. Consequently, the contract was not one upon which that company could maintain an action. Although, as a general rule, most jurisdictions, including our own, recognize the doctrine that a third person may maintain an action on a promise made for his benefit, *yet this doctrine is limited to cases where a third person, is either a party to the consideration or the contract created in him a legal or equitable interest entitling him to compel performance: Blymire v. Boistle, 6 Watts 182; Kountz v. Holthouse, 85 Pa. 235; Adams v.*

Kuehn, 119 Pa. 76. Unless the facts of the case are such as to bring it within these exceptions, the general rule is that no one can sue upon a contract to which he is not a party. Tested by the foregoing principles an action could not be successfully maintained upon the contract in question by the railroad company. The agreement was made for the benefit of Klingler & Company, as a means of access by rail to their place of business. The consideration moved from Klingler & Company to Duffy and the only benefit to be obtained by the railroad was an indirect one, as stated above."

There are numerous decisions in Pennsylvania in which a third party to a contract has enforced rights under it. These cases are at times referred to as exceptions to the general rule announced in *Blymire v. Boistle*. They are really not exceptions to that rule, but are illustrations of an entirely different rule. An examination of the facts in all these cases will disclose that some valuable right or property, not theretofore belonging to the promisor, was given to or acquired by him for a designated application to the use and benefit of the third party and the courts have *enforced the trust*.

The distinction between the two lines of cases has been made clear in numerous decisions.

In *Guthrie v. Kerr*, 85 Pa. 303 (1877), Mr. Justice Woodward, speaking of the decision in *Blymire v. Boistle*, said, page 308:

"The rule laid down in that case was that if one pay money to another for the use of a third person, or having money belonging to another, agree with that other to pay it to a third, action lies by the person beneficially interested. But where the contract is for the benefit of the contracting party, and the third person is a stranger

to the contract and consideration, the action must be by the promisee. In the one instance the promisor becomes the custodian and trustee of a fund actually belonging to the beneficiary. In the other he undertakes to pay some sum or do some act in consideration of a benefit conferred on himself."

In *Adams v. Kuehn*, 119 Pa. ~~75~~⁷⁶ (1888), Mr. Justice Williams states the distinction as follows, at page 85:

"Among the exceptions are cases where the promise to pay the debt of a third person rests upon the fact that money or property is placed in the hands of a promisor for that particular purpose. Also where one buys out the stock of a tradesman and undertakes to take the place, fill the contract, and pay the debts of his vendor. These cases as well as the case of one who receives money or property on the promise to pay or deliver to a third person are cases in which the third person, although not a party to the contract, may be fairly said to be a party to the consideration on which it rests. In good conscience *the title to the money or thing which is the consideration of the promise passes to the beneficiary, and the promisor is turned in effect into a trustee.*"

In the present case it will be observed

First.—That the plaintiffs did not obtain the equipment from the lessee.

Second.—That the direct parties to the contract have made application of all the money paid "as compensation for use of the shovel."

Third.—That the only title Bates & Rogers had was that of a lessee obligated to return the leased property to the claimants, and that was the only title they had any control over.

It is erroneous to state that the rule is peculiar to Pennsylvania. It is likewise the law in Federal Courts.

National Bank v. Grand Lodge, 98 U. S. 123, in which it was held that a corporation which assumed the payment of bonds of another association in consideration of the issue to the former of stock of the latter to the amount of the bonds assumed to be paid, could not be sued by a holder of the bonds because the latter was not in such privity with the promisor, nor had he such an interest in the contract between it and the association as to warrant a suit in his own name to compel the promising corporation to pay the bonds.

Referring to the decision in the last mentioned case, Mr. Justice Lamar in Insurance Co. v. Water Co., 226 U. S. 220 (1912) said, at page 230:

"Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least, show it was intended for his direct benefit. For, as said by this Court, speaking of the right of bondholders to sue a third party who had made an agreement with the obligor to discharge the bonds, they 'may have an indirect interest in the performance of the undertakings, but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names.' " Nat. Bank v. Grand Lodge, 98 U. S. 123, 124; Hendrick v. Lindsay, 93 U. S. 143, 149; National Savings Bank v. Ward, 100 U. S. 195, 202, 205.

Mr. Justice Lamar, in Insurance Co. v. Water Co., 226 U. S., at page 230, stated that a stranger to a contract must show that the contract was intended for his direct benefit before he can avail himself of the exceptional privilege of suing for its breach.

In discussing the rights of a third party under a contract to which he is not a party, Mr. Justice Brown

in *Constable v. National Steamship Co.*, 154 U. S. 51, states on page 74:

“The contract must be made for his benefit as *its object* (italics are those of the Court), and he must be the party intended to be benefited.”

He then proceeds:

“The principle above announced was still further limited by the Court of Appeals in *Vrooman v. Turner*, 619 N. Y. 280, in which it was said that, to give a third party the right to sue, who may derive a benefit from the performance of a promise or action, there must be, first, intent by the promisor to secure some benefit to the third party; and, second, some privity between the two, the promisor and the party to be benefited, and some obligation or duty owing from the promisor to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent to him personally.”

In the case at bar, the contract was for the benefit of the contracting party, Bates & Rogers, who desired *the use* of the claimants' shovel, and the express agreement between the parties was that the rental of \$25 per day was compensation to the lessors (claimants) for lessee's *use* of the shovel. *It was upon that contract, which also required the return of the shovel to the plaintiffs by the lessee, that the plaintiffs parted with possession of their property* (Finding of Fact VI, Record, pp. 12-13).

The written agreement between the parties clearly shows that the property in question, a steam shovel, was and had been the sole property of the claimants, that the lessee, Bates & Rogers, not the United States, desired to obtain its use, and the agreement then distinctly provides that the lessee (Bates & Rogers) will pay, and the “lessor agrees to receive as and for the

lessor's compensation for the use of said steam shovel by the lessee, and the lessor's services hereunder a rental of \$25 per diem for such equipment after the same has been shipped (as evidenced by bill of lading) until the lessee is through with the same and it has been loaded for return shipment as evidenced by bill of lading."

The rule in the Federal Courts is that for a third party to be permitted to enforce rights under a contract to which he is not a party, the "contract must be made for his benefit as its object."

What was the object of the contract between claimants, as lessors, and Bates & Rogers Construction Company, as lessee? It was the use by the latter of the former's property at a certain rental from the time the property was shipped to the lessee until it was shipped back by the lessee, and its return to the lessor in good condition, less ordinary wear and tear. That is the real object and obligation of the contract. The rights of the United States to acquire the shovel are purely collateral and inconsistent with the binding obligations of the contract, as between the parties thereto.

The provisions in Section 8 of the present contract under which the Government, a stranger to the contract, claims the right to purchase the lessor's equipment for the declared valuation less total rentals paid, are repugnant to and inconsistent with the covenant of the lessee, an actual party to the contract, to return the leased equipment to the lessors in as good condition as when received, less ordinary wear and tear and damage by fire or inevitable accident; and in the meanwhile to pay the rental of \$25 per day, for the use of the shovel, from date of bill of lading, evidencing shipment of the shovel to the lessee, to the date of the bill of lading for return shipment. The lessee's obligation to pay the rental reserved was unlimited in amount except as measured by the number of days between the

date of the two bills of lading. So far as the rights of the actual parties to the lease were concerned, the lessee could not cease payment of rent when the total rentals paid amounted to \$5000.

The case is clearly one, therefore, for the application of the general principle that where two clauses are inconsistent and conflicting, they must be construed so as to give effect to the intention of the parties as collected from the whole instrument; and if one clause is at variance with another, the one contributing most essentially to the contract will be entitled to more consideration than that which contributes less:

Strauss v. Wanamaker, 175 Pa. 213; 9 Cyc.
583.

In the present case the real intent, purpose and object of the parties was for the lessor to give and the lessee to acquire the use of the lessor's steam shovel at a certain rental with an obligation on the part of the lessee to return the leased article. The contract gives the lessee no right to purchase the shovel upon any terms.

THE UNITED STATES COULD NOT RELEASE THE PLAINTIFFS FROM THEIR OBLIGATIONS UNDER THE CONTRACT.

It was argued in the lower court that a third party beneficiary may sue on a contract to which he is not a party if his release would operate as a discharge of the promisor, and that as the right to purchase the shovel by application of the rental paid by the lessee to the lessor, was vested solely in the United States, it is the only party who could release the claimant and therefore it has enforceable rights under the contract.

A release means a release of the binding obligations of the contract, the right to discharge the party

bound. The United States could not release the claimant of the real, substantial, direct binding obligations of the contract to furnish to Bates & Rogers a complete Erie Traction steam shovel in good working order for use by the lessee at New Cumberland, Pennsylvania, for the time stated at a rental of \$25 per day. That was the real obligation of the contract and over that obligation the United States had no control.

If the United States, a stranger to the contract and to the consideration, acquired no enforceable rights under it, if there was no binding obligation to it—then it could release nothing. The United States was not the only party in interest. Legally it was not a party in interest. The contract is to be taken as a whole to ascertain what was its real purpose and direct object. Suppose, during the operation of the contract, the United States released the claimants from its alleged rights to purchase the shovel under the terms of the contract—would that have relieved the claimants from their real obligations under the contract? Subjected to the tests laid down in the Federal and Pennsylvania cases, the United States occupies a distinctly secondary position in the contract, and, therefore, not being a party, it acquired no enforceable rights.

The attention of the Court is directed to the provisions of Article VI, Section (e) of the contract of April 26, 1918, between Bates & Rogers Construction Company, as contractor, and the United States, of which contract Article II, Section (c), now relied upon by the Government, is a part. Article VI, Section (e), provides (Record, p. 25):

“Special Requirements. The Contractor hereby agrees that it will . . . (e) . . . insert in every contract made by it or the furnishing to it of services, materials, supplies, machinery and equipment, or the use thereof, a pro-

vision that such contract is assignable to the United States; will make all such contracts in its own name, and will not bind or purport to bind the United States or the contracting officer thereunder."

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There was no consideration passing from the United States to plaintiffs.

It was argued in the lower court that a consideration moved from the United States to the plaintiffs by virtue of the Act of Congress of February 24, 1905, (33 Stat. 811) providing that a party supplying labor or material to one having a contract with the United States for the prosecution of any public work may look to the bond entered by the contractor for payment, subject to the priority claim of the United States.

It is obvious, however, that the plaintiffs possessed the right to pursue the surety on the primary contractor's bond by virtue of the act of Congress and not by virtue of the alleged option to purchase in the contract between plaintiffs and Bates & Rogers Company. The plaintiffs would have possessed their right to intervene in a suit by the United States on the contractor's bond, or to have instituted their own suit, in accordance with the provisions of the act, entirely independent of any alleged rights or options in the United States in the contract between Bates & Rogers and the plaintiffs, and even if the shovel had been furnished to Bates & Rogers under an informal verbal agreement, containing no reference to the United States. The test of the right of a sub-contractor to the benefits of the Act of Congress, approved February 24, 1905, is whether he has furnished labor or materials to a contractor for the prosecution of a public work for the United States.

ASSUMING, HOWEVER, THAT THE UNITED STATES ACQUIRED ENFORCEABLE RIGHTS UNDER THE CONTRACT OF LEASE BETWEEN THE CLAIMANTS AND BATES & ROGERS CONSTRUCTION COMPANY, WHAT WERE THOSE RIGHTS AND WERE THEY ENFORCEABLE AT THE TIME THE UNITED STATES APPROPRIATED THE CLAIMANTS' PROPERTY?

Article II of the contract between the Bates & Rogers Construction Company and the United States pertains to the cost of the work to the United States and provides generally that the contractor shall be reimbursed, in the manner described, for such of its actual net expenditures in the performance of the work as may be approved or ratified by the contracting officer and as are included in various items, with most of which we are not concerned.

Item (a) relates to all labor, material, machinery, etc.; (b) all sub-contracts; (c) (upon which the Government relies in the present case) relates entirely to rentals and divides the rentals into two kinds. The first paragraph of Section (c) relates to rentals actually *paid by the contractor* for construction plant in sound and workable condition, such as pumps, steam shovels and such other equipment as may be necessary for the proper and economical prosecution of the work.

The second paragraph of Section (c) relates to "*rental to the contractor for such construction plant or parts thereof as it may own and furnish,*" and provides: "When *such* construction plant or any part thereof shall arrive at the site of the work, the contractor shall file with the contracting officer a schedule, setting forth the fair valuation at that time of each part of *such* construction plant. . . . When and if the total rental paid to the contractor for any *such* part shall equal the valuation thereof, no further rental

therefor shall be paid to the contractor and title *thereto* shall vest in the United States. *At the completion of the work* the constructing officer may at his option purchase for the United States any part of such construction plant then owned by the contractor by paying to the contractor the difference between the valuation of such part or parts and the total rentals theretofore paid therefor."

It will be observed that in the contract between the Bates & Rogers Construction Company and the United States, there was no provision for the declaration of the fair valuation of *equipment furnished to the contractor* nor any provision whatever for the acquisition by the United States of equipment for which rental was actually paid by the contractor for equipment leased to the contractor by third parties.

Provisions for valuation of equipment and acquisition of the same by the United States related *solely to equipment owned and furnished by the contractor*.

The contract of lease, however, between the claimants, as lessors, and the Bates & Rogers Construction Company, as lessee, attempts to subject the equipment leased thereunder to the provisions of Article II, paragraph (c) of the agreement between the Bates & Rogers Construction Company and the United States "to the end that the United States Government may have and exercise as to and against the said equipment all rights, provided for in said paragraph (c) with respect to plant or parts thereof owned and furnished by the party of the second part hereto the lessor to be entitled, as owner, to receive any purchase price payments which upon any appropriation of said equipment by the United States Government, under said Article II, may be coming from said Government."

As heretofore pointed out, Article II, Section (c) of the contract between the Bates & Rogers Construction Company and the United States provided for the acquisition by the latter of title to such part or parts of the construction plant as was owned and furnished by the contractor in either one of two cases:

First.—When the total rental paid to the contractor equaled the valuation thereof, then title should vest in the United States;

Second.—At the completion of the work the United States had the option to purchase any part of such construction plant *then owned by the contractor* "by paying the difference between the valuation of such part and the rental theretofore paid therefor."

The lower Court has found as a fact that the rentals paid to plaintiffs were only \$4225 and as a further fact that the work had not been completed until after November 6, 1918 (Record, p. 18). The shovel was appropriated by the Government on October 17, 1918 (Record, p. 15), and shipped on November 2, 1918, from New Cumberland to Mays Landing, New Jersey, "to be used on other Government work" (Record, p. 18).

CONCLUSION.

It is respectfully submitted that the facts found by the lower Court establish a Governmental appropriation of plaintiffs' property, conceded to belong to the plaintiffs, at the time of the appropriation, and then worth \$5000, and that in ascertaining fair and just compensation for the value of the property at the time of its appropriation the Government is not entitled to deduct the amount of rentals paid to plaintiffs by the lessee of the property appropriated.

It is submitted that the action of the lower Court in entering judgment for the plaintiffs for \$775, should be modified and judgment entered in favor of plaintiffs for \$5000.

Respectfully submitted,

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